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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. ANTONIO MARRON, Defendant and Appellant.	B190868 (Los Angeles County Super. Ct. No. GA059849)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mildred Escobedo, Judge. Reversed in part, affirmed as modified in part, and remanded with directions.

John Doyle, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Robert F. Katz and Peggie Bradford Tarwater, Deputy Attorneys General, for Plaintiff and Respondent.

Antonio Marron was convicted of attempted willful, deliberate and premeditated murder (count 1) and robbery (count 2), with true findings on allegations that he personally inflicted great bodily injury (counts 1 and 2), and committed the crimes for the benefit of a criminal street gang (counts 1 and 2). (Pen. Code, §§ 664, 187, subd. (a), 211, 12022.7, subd. (a), 186.22, subd. (b)(1)(A).)[1] On count 1, he was sentenced to state prison for life (with a 15-year minimum parole eligibility proviso for the gang enhancement), plus three years for the great bodily injury enhancement (on count 2, sentence was imposed and stayed). Marron appeals, contending reversal is required (I) because the prosecutor failed to disclose the identity of rebuttal witnesses, (II) because there was evidentiary error, and (III) because there is insufficient evidence with regard to the robbery count and the gang enhancements. We agree that there is insufficient evidence to support Marron's robbery conviction and that it must be reversed, modify the judgment by striking the stayed sentence on the robbery count and, as modified, affirm.

FACTS

As Christian Recarte (the victim) rode his bicycle on Orange Grove Boulevard, he saw Marron (whom he knew from school) stick his head out of a gold car traveling in the same direction. The car passed Recarte and he continued around a corner onto Mentor Street, then saw the car coming toward him. The car stopped and several people got out. Recarte "knew something was going to happen" and tried to ride away. The people got back in the car and followed him.

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[1] All section references are to the Penal Code.

On Villa Street, someone in the car yelled to Recarte, asking where he was from. When Recarte said "nowhere," the person in the car yelled back, "This is PLK" (the Pasadena Latin Kings gang). The car then hit Recarte, knocking him off his bicycle. Recarte got up and tried to run away but was quickly surrounded by six people, including Marron.

Someone in the group said, "We are going to kill you now," and a short man then stabbed Recarte in the chest. The others joined the attack, knocking Recarte to the ground and repeatedly punching him. One of the assailants hit Recarte with a golf club, and Marron repeatedly stabbed Recarte with a pocket knife (more than a dozen times). The attack ended when two men came out of a nearby house and told the assailants to stop, at which point all but one of the assailants went back to their car. "The [first] guy that had stabbed [Recarte], the short guy, . . . took off with [Recarte's] bike." The others got back into the gold car and drove away.

Paramedics took Recarte to a hospital where he told a police officer that he had been attacked by PLK gang members. A few days later, Recarte identified Marron by his gang moniker (Grumpy) and later selected Marron from a photographic array (as "the fool that tried to kill me"). Marron was arrested and charged.

At trial, the People presented evidence of the facts summarized above, plus expert testimony to establish PLK's criminal activities and the extent of Recarte's injuries (which included a collapsed lung). The jury rejected Marron's misidentification defense and convicted him as noted at the outset.

DISCUSSION

I.

Marron contends reversal is required because the prosecutor failed to disclose the identity of a rebuttal witness. We disagree.

A.

Jose Orozco told the police he was in the car when Marron stabbed Recarte but that he had not known the attack was going to occur and did not participate. At some later point, Orozco told the defense investigator that he had only repeated what an officer told him to say.

During a break in Recarte's direct testimony, a question arose about whether the prosecutor intended to call Orozco as a witness and, if so, whether his testimony was sufficiently reliable to be admissible. The trial court did not rule at that time, finding the issue premature because no one knew whether Orozco's lawyer would advise him to refuse to testify. When trial resumed after the lunch recess, Orozco's lawyer appeared and told the court Orozco would invoke his Fifth Amendment right and refuse to testify. When the prosecutor said the People would grant immunity to Orozco, his lawyer said he would have to review the scope of the offer of immunity.

The next morning, before trial resumed, the prosecutor told the court he did not intend to call Orozco during the People's case-in-chief, and that although he had authority to grant transactional immunity (as requested by Orozco's lawyer) he had decided that he did not want to do so unless he needed Orozco as a rebuttal witness. Defense counsel reminded the court that she would be calling alibi witnesses, then asked whether the prosecutor

intended to call Orozco. The trial court responded that the prosecutor was not required to commit until the defense rested. When the court refused to reconsider its ruling, the defense counsel announced that, "[b]ased on the court's unwillingness to rule, I'm not going to present an alibi witness . . . ."

B.

We summarily reject Marron's assertion that the prosecution's duty to disclose the identity of potential rebuttal witnesses includes a duty to say, before the defense rests, whether a particular rebuttal witness will be called. No relevant authority is cited for this proposition and we know of none.[2] The prosecutor was required to (and did) disclose the identity of the witnesses, including rebuttal witnesses (*Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 375; *People v. Tillis* (1998) 18 Cal.4th 284, 292), but no more was required.

II.

Marron contends the trial court erred in excluding evidence that Recarte was intoxicated at the time he was attacked. We disagree.

Recarte's hospital records included a social worker's (Yolanda Montoya) notation that he was "under the influence" when he arrived at the hospital. When Marron told the court he wanted to offer the notation into evidence as a business record, a hearing was held (outside the presence of the jurors) at which

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[2] *People v. Gonzalez* (2006) 38 Cal.4th 932, the only case cited by Marron, is a capital case in which the prosecutor said he did not have to tell defense counsel "'what type of rebuttal evidence [he] intend[ed] to put on in the penalty phase.'" (*Id.* at pp. 953-954.) In context, it is clear that the prosecutor refused to identify his rebuttal witnesses, no more and no less, and there is nothing in *Gonzalez* to suggest that a prosecutor must decide during his case-in-chief which of his disclosed witnesses will in fact be called as rebuttal witnesses. *Gonzalez* does not stand for the proposition advanced by Marron.

Montoya testified that she had no memory about whether she had observed signs of intoxication or whether someone had told her Recarte was intoxicated (and she had no idea who would have told her). The court excluded the notation on the ground that it was not reliable.

Based on Montoya's testimony, the trial court's ruling was correct, and certainly not an abuse of discretion. (*People v. Sword* (1994) 29 Cal.App.4th 614, 626.) Because the excluded evidence was at most marginally relevant and certainly not critical (Marron claims it went to Recarte's identification of Marron, but this argument ignores the fact that the two knew each other before the attack), there was no due process violation. (*People v. Cunningham* (2001) 25 Cal.4th 926, 998-999.)

III.

Marron contends there is no evidence that he shared his cohort's intent to take Recarte's bicycle and that his robbery conviction must be reversed. We agree.

The evidence shows that Recarte was chased and attacked by several PLK gang members, that the attack ended when two men came out of their house, that all but one of the assailants fled in their car, and that the remaining assailant "took off" on Recarte's bicycle. Nothing in this evidence shows that the theft of the bicycle was part of the assailants' plan, or that Marron shared (or knew of) the robber's intent to take the bicycle -- which appears to have been a spur of the moment decision. (*People v. Beeman* (1984) 35 Cal.3d 547,

560-561; *People v. Hill* (1998) 17 Cal.4th 800, 851.)[3] For this reason, the robbery conviction must be reversed, and the stayed sentence on the robbery conviction must be vacated.

IV.

Marron contends there is insufficient evidence to support the gang enhancement finding (specifically, the requirement that crime is one of PLK's "primary activities"). We disagree.

The additional penalty provided by section 186.22 must be supported by evidence that the defendant actively participated in a criminal street gang -- that is, an "ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its ***primary activities*** the commission of one or more of [certain enumerated crimes, including murder, robbery, and assault]." (§ 186.22, subd. (f), emphasis added; *People v. Sengpadychith* (2001) 26 Cal.4th 316, 323.) Although the present offense alone is insufficient to establish the "primary activity" element (*id.* at p. 323), it may be considered together with the gang expert's testimony and evidence that the gang's members consistently and repeatedly have committed the crimes included in the statute (*id.* at pp. 323-324).

Pasadena Police Officer John Calderon spent four years in the Department's gang unit, three of them as "lead Latino intelligence officer, primarily focusing on intelligence on Latino gangs in the City of Pasadena." He

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[3] Although the trial court concluded otherwise when it denied Marron's motion for acquittal, its decision seems to be based on the fact that Recarte was on the bike at the time of the attack -- a fact which to us does not support an inference of knowledge or intent vis-à-vis the robbery.

testified that PLK (the Pasadena Latin Kings) is an active gang with fewer than 10 active members but about 70 who are inactive. As is common to criminal street gangs, PLK has its own hand signs and tattoos, and there are photographs of gang members (including Marron) throwing signs and showing off their markings. Marron is an admitted member of PLK.

Officer Calderon's testimony established that carjacking and robbery, two of the enumerated crimes, are among PLK's primary activities -- he testified about an attempted carjacking that resulted in a gang member's conviction of robbery,[4] and another gang member's conviction of unlawfully taking a vehicle[5] -- and that PLK members protect their neighborhood by assaulting innocent people in order to instill fear in the community. These crimes, which establish a "'pattern of criminal gang activity'" within the meaning of subdivision (e) of section 186.22, together with the current offense -- a particularly vicious attempted murder committed within the gang's territory, with the assistance of other gang members, and for the benefit of the gang -- suffice to show that one of PLK's primary activities is the commission of the statutorily enumerated crimes. Quite clearly, this shows more than "the occasional commission" of crimes by the group's individual members and makes it clear that the gang had no legitimate raison d'etre. (*People v. Sengpadychith, supra,* 26 Cal.4th at pp. 323-324.)

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[4] Two gang members, Jose "Flaco" Garcia and Rafael "Goofy" Valenzuela, approached the victim "and attempted to carjack him in a parking lot." This offense resulted in Garcia's conviction of attempted robbery (a negotiated plea).

[5] Although the officer's testimony is not a model of clarity, it is sufficient to show that another gang member, Arial "Dopey" Solis, was involved in another carjacking which resulted in his conviction of unlawfully taking a motor vehicle (again, a negotiated plea).

DISPOSITION

Marron's conviction of robbery (count 2) is reversed and the stayed sentence imposed on count 2 is vacated; in all other respects the judgment is affirmed and the cause is remanded to the trial court with directions to issue a corrected abstract of judgment and to forward it to the Department of Corrections.

NOT TO BE PUBLISHED.

VOGEL, J.

We concur:

MALLANO, Acting P.J.

JACKSON, J.*

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*Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.